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In The

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ENRICO ST. CYR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ASSOCIATION OF FEDERAL DEFENDERS, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, COMMITTEE FOR PUBLIC COUNSEL SERVICES OF THE COMMONWEALTH OF MASSACHUSETTS, COOK COUNTY PUBLIC DEFENDER'S OFFICE, DIVISION OF PUBLIC DEFENDER SERVICES OF THE STATE OF CONNECTICUT, FLORIDA PUBLIC DEFENDER ASSOCIATION, LOS ANGELES COUNTY PUBLIC DEFENDER, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE DEFENDERS ASSOCIATION, PUBLIC DEFENDER OF FLORIDA'S ELEVENTH JUDICIAL CIRCUIT, TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION, THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, WASHINGTON DEFENDERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are associations of public and private criminal defense lawyers who have represented or counseled thousands of lawful permanent resident immigrants accused of crimes over the years. Before the 1996 amendments to the nation's deportation laws, many of our lawful resident immigrant clients gave up their right to a trial and agreed to plead guilty. They did so with the expectation that conviction would not result in deportation, or at least not mandatory deportation. This understanding arose because, under pre-amendment law, even if they were subjected to deportation proceedings, they had a statutory right to seek a waiver of deportation so long as they had lawfully resided in the United States for at least seven years. Nevertheless, after Congress amended the deportation laws to place new criminal bars on the right of long-term lawful permanent residents to apply for relief from deportation, the government has sought to apply these amendments to pre-amendment conduct and convictions even though Congress did not direct such retroactive application. *Amici* have a strong interest in protecting our lawful resident immigrant clients from unfair disruption of the reasonable expectations they formed when pleading guilty or making other choices during their criminal proceedings based on our legal advice. Thus, to inform the Court's review of the decision below, *amici* offer this brief, which is based on our collective experience in the representation and counseling of lawful resident immigrants in criminal proceedings.[2]

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[1] This *amici curiae* brief is filed with the written consent of all parties. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission.

[2] The separate statements of interest of each of the *amici* criminal defense organizations are included in Appendix A.

SUMMARY OF ARGUMENT

This brief addresses the government's contention on the merits that application of 1996 amendments mandating deportation for certain offenses to the respondent – whose deportable conduct and plea of guilt to that conduct preceded these amendments – does not violate the presumption against retroactivity of new laws. As a preliminary matter, *amici* agree with the respondent and the court below that the 1996 amendments – Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, § 304(b), 110 Stat. 3009 (1996) – do not include any clear and unambiguous statement of retroactive congressional intent. In the absence of any such clear statement, the presumption against retroactivity precludes the government from applying the 1996 amendments to any individual whose deportable conduct predated the effective date of the amendments. (*See* Point III). However, as the Second Circuit's holding was limited to those individuals, like the respondent, who pled guilty prior to the amendments, *amici* will focus first and foremost on that more narrow holding. (*See* Points I and II).

Much is at stake when lawful permanent resident immigrants are accused of a crime that could render them deportable. Lawful resident immigrants possess a status that confers authorization to reside in this country, to work without restriction, and to travel abroad and lawfully return to the United States. However, a lawful resident immigrant who was convicted prior to the 1996 deportation law amendments had a statutory right to apply for relief from deportation *before* his or her lawful resident status could be extinguished in any subsequent deportation proceedings. Lawyers representing lawful resident immigrants in criminal proceedings were aware of this through defense practice aids, training, and expert consultations. Thus, criminal defense lawyers – as well as other lawyers, community advocates, and immigrant neighbors, friends, and family – advised lawful resident immigrants that conviction would

not necessarily result in deportation. Lawful resident immigrants pled guilty or made other choices in their criminal proceedings in reliance on this advice. (*See* Point I).

In order to maintain confidence in the integrity and fairness of the plea bargaining process, the reasonable reliance of lawful resident immigrants on the law in effect at the time of a guilty plea should be protected from undue interference. At present, over 90 percent of criminal convictions are obtained by guilty plea. Clearly, the criminal justice system relies heavily on the willingness of criminally accused persons to give up their right to a jury trial and other constitutional rights by agreeing to plead guilty. However, the government's disruption of the settled expectations and reasonable reliance of lawful resident immigrants who pled guilty prior to the 1996 amendments unduly and unlawfully interferes with the plea bargaining process. This is because taking away a lawful resident immigrant's right to apply for relief from deportation changes the legal consequence of his or her pre-amendment conduct and plea. Whereas, at the time of the plea, deportation had been only a possibility, the government's position now makes deportation certain in many cases. Thus, the court below correctly found that the government's application of the new laws to a pre-amendment guilty plea has retroactive effect and violates the presumption against retroactivity of new statutes. (*See* Point II).

In any event, the law recognizes that people have a right to know the possible legal consequences of their actions at the time of their original conduct, whether or not they will be able to demonstrate subsequent conduct, such as a guilty plea, in reliance on that knowledge. Thus, the Court's decisions – in both the civil and criminal contexts – have rightly found that it is the law on the date of the original conduct at issue that is the crucial benchmark for determining impermissible retroactive effect of application of a new law regardless of whether there is later conduct demonstrating reliance on prior law. Therefore, the government's application of the 1996 amendments to the original conduct here is itself impermissibly retroactive. (*See* Point III).

ARGUMENT

I. LAWFUL PERMANENT RESIDENT IMMIGRANTS RELIED ON THE RIGHT TO SEEK RELIEF FROM DEPORTATION WHEN PLEADING GUILTY PRIOR TO THE 1996 AMENDMENTS

In criminal proceedings, the accused faces a number of choices on how to proceed. He or she may (1) plead guilty as charged; (2) plead guilty to a lesser offense in satisfaction of more serious charges; or (3) contest the charges and proceed to trial. If the accused agrees to forego his or her right to a trial and plead guilty, he or she may choose among different disposition options after considering the penal sanctions and other consequences of each option. If the case progresses to trial, different choices may present themselves, such as whether to make pre-trial motions or raise defenses with respect to certain charges, and not to others. And once there is a disposition of guilt by plea or verdict, the accused may choose to appeal or refrain from doing so.

These choices are faced by the innocent as well as the guilty. Though innocent, an individual accused of a crime who is held without bail may choose to plead guilty to a lesser charge in order to get out of jail with a sentence of "time served" only, or in order to avoid the threat of a longer prison sentence after trial on a more serious charge. *See North Carolina v. Alford*, 400 U.S. 25, 33 (1970) (holding that a guilty plea is not inconsistent with a claim of innocence because "reasons other than the fact that he is guilty may induce a defendant to so plead").

In weighing his or her choices during a criminal case, a lawful permanent resident immigrant defendant faces the additional risk of deportation from the United States and loss of his or her highly valued status. A lawful resident immigrant – holder of the much-sought-after "green card" – has been admitted to the United States with legal authorization to reside permanently in this country, to work without restriction, and to travel abroad knowing that he or she may lawfully return. As a result, the risk of deportation is a

central concern of any plea negotiations involving such a client.

A. Lawful Permanent Resident Immigrants Convicted Prior To The 1996 Amendments Had A Statutory Right To Seek Relief From Deportation

Lawful permanent resident immigrants who pled guilty to a crime that subjected them to possible deportation have long had a right to seek a waiver of exclusion or deportation from an immigration judge under Section 212(c) of the Immigration and Nationality Act (INA), provided they had been lawfully domiciled in the United States for seven years at the time of their deportation hearing. *See* Immigration and Nationality Act of 1952, § 212(c), 66 Stat. 163 (codified as amended at 8 U.S.C. § 1182(c) (1994)); *see also Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (holding that 212(c) relief is available in deportation as well as exclusion proceedings); *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976) (adopting and applying *Francis* holding nationwide). Under pre-amendment law, 212(c) relief was barred only if the lawful resident immigrant had been convicted of an "aggravated felony or felonies" and had served five years or more in prison for the crime(s). *See* 8 U.S.C. § 1182(c) (1994).

Even if an immigration judge found that a lawful permanent resident had been convicted of a deportable offense, the judge was required by law to adjudicate an application for 212(c) relief before deportation could be ordered. *See* 8 C.F.R. § 212.3(e) (2000). In addition, the immigration judge's discretion on whether to grant 212(c) relief was governed by standards established by the Board of Immigration Appeals, and the judge's decision was subject to review by the Board. *See, e.g., Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978) (setting forth adjudicatory standard weighing positive factors, such as family ties and long residence, against seriousness of criminal record). In fact, in the years prior to the 1996 amendments, about half of applications for 212(c) relief were granted. *See Tasios v. Reno*, 204 F.3d 544, 551 (4th Cir. 2000) (citing *Mojica v. Reno*, 970 F. Supp. 130, 178 (E.D.N.Y. 1997)).

Therefore, under pre-amendment law and practice, a long-time lawful resident immigrant accused of a crime could be assured that, even if he or she pled guilty or was otherwise convicted in the criminal proceedings, he or she would be able to seek a waiver of deportation in any subsequent deportation proceedings. Additionally, the lawful resident immigrant could be reasonably advised that he or she would have a good chance of being granted the waiver, especially if he or she had long resided in the United States or had significant family and other ties to the country.

B. Pre-1996 Practice Aids Informed Defense Lawyers Regarding the Immigration Implications of Conviction Including the Right of Long-Term Lawful Permanent Resident Immigrants to Seek Relief from Deportation

Prior to the 1996 deportation law amendments, there were numerous immigration law practice aids designed specifically to assist criminal defense lawyers in analyzing the immigration consequences of criminal convictions for noncitizen defendants. These practice aids invariably included information about the important right of lawful permanent resident immigrants to seek a 212(c) waiver of deportation. For example, *Immigration Law and Crimes*, considered the national "Bible" for determining immigration law implications of criminal cases, informed defense lawyers that the 212(c) waiver is "extremely beneficial" and emphasized its importance as an ameliorative mechanism for those charged with crimes that could trigger immigration consequences, particularly drug offenses such as the respondent's. Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes*, § 11.4 (West Group 1984-2000). Other practice aids also advised defense lawyers about the wide availability of 212(c) relief. *See* Maryellen Fullerton and Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 Am. Crim. L. Rev. 425, 440 (1986) (instructing defense attorneys that the "only crime for which this [212(c)] waiver is unavailable is a conviction for possession of a shotgun or automatic

weapon"); Katherine A. Brady and David S. Schwartz, *Public Defenders Handbook on Immigration Law* (California Public Defenders Association, 1988) (instructing defense attorneys that "[t]he eligibility of [lawful permanent residents] to apply for a [212(c)] waiver of deportation or exclusion will survive a conviction for any crime, except possession of a sawed-off shotgun or automatic or semi-automatic weapon") (see lodged document L-16); Tarik H. Sultan, *Immigration Consequences of Criminal Convictions: A Guideline for the Criminal Defense Attorney*, 30-Jun Ariz. Att'y 15, 31 (1994) (instructing defense attorneys that a 212(c) waiver "is probably the most common form of relief available, and also certainly the easiest to obtain").

The information about the importance of 212(c) relief provided to criminal defense lawyers by these practice aids is well summarized in a defense manual that was used by federal defenders nationwide:

> The most readily available form of relief from deportation/exclusion is the discretionary waiver available under § 212(c) of the Act. This waiver is available to aliens who have accrued at least seven years of uninterrupted legal resident status in the United States . . . . It is crucial that defense counsel determine whether a non-citizen client is eligible for this waiver. . . . The wisest course of action is to consult with an immigration attorney regarding the probability that the client would be eligible for such a waiver, after trying to determine the client's immigration status and criminal history, so that the client will be able to make an informed choice.

Larry Ainbinder, updated by Hilary Hochman, Ch. 17, *Special Considerations in Representing the Non-Citizen Defendant*, in *Defending a Federal Criminal Case* 837, 853 (Federal Defenders of San Diego, 1995 ed.) (see lodged document L-13).

The practice aids conveyed to defense lawyers the sense that, if their lawful resident client was considering a plea but was worried about deportation, the possibility of 212(c) relief could be raised as a means of allaying the client's concerns about a decision to plead guilty. For example, one practice

aid advised: "[T]he attorney should consider the possibility of § 212(c) relief. It should be discussed with the alien client prior to the plea or trial. This may help alleviate the alien's fears." James A. Benzoni, *Defending Aliens in Criminal Cases* (training materials prepared for criminal defense lawyers attending CLE programs in Iowa from 1994-1997) (see lodged document L-15).

The practice aids also emphasized the importance of taking any necessary affirmative steps to preserve eligibility for 212(c) relief. This was the case particularly after enactment of the Immigration Act of 1990, which made persons ineligible for 212(c) relief if they had served five years in prison for an aggravated felony conviction. Immigration Act of 1990, Pub. L. 101-649, § 511(a), 104 Stat. 5052. For example, a 1991 article, which was distributed to all members of *amicus* National Association of Criminal Defense Lawyers (NACDL), counseled: "In entering a plea, a criminal defense attorney should be aware of this serious consequence [ineligibility for 212(c) relief under the Immigration Act of 1990] and take steps, where possible, to avoid it." Ira J. Kurzban, *The Immigration Act of 1990*, The Champion, Apr. 1991, at 5; *see also* Jan J. Bejar, *Representing Aliens in Criminal Proceedings* in Criminal Justice Act Seminar materials, June 4, 1991 ("This is an extremely important waiver . . . negotiating a term of even one day less than five years could make a difference") (see lodged document L-14).

A partial list of the many books, defense manual chapters, articles, and other materials containing similar advisals for defense lawyers throughout the country in the years preceding the 1996 amendments is included in Appendix B.

C. Training Programs Further Alerted Defense Lawyers to the Immigration Implications of Conviction and to Relief from Deportation

Prior to the 1996 amendments, criminal defense lawyers attended trainers on the immigration consequences of criminal convictions, including the availability of relief from deportation. The National Immigration Project conducted or

participated in numerous training presentations throughout the country, including programs specifically addressing 212(c) relief. *See* Appendix C. In addition, Federal Judicial Center training for federal defenders from all over the country has periodically included training on the immigration issues in criminal cases. *See id.* Many other organizations or individual immigration law experts provided similar training that focused on immigration issues relating to a particular state's criminal laws, including eligibility for relief. For example, in California, the state with the largest lawful permanent resident immigrant population, the Immigrant Legal Resource Center (often in Continuing Legal Education seminars co-sponsored by the California Bar Association, Criminal Law Section), as well as individual public defender offices, private expert lawyers, and law school faculty, provided training to defense lawyers about the immigration consequences of criminal convictions. Over thirty of such training seminars were conducted in the 1990s alone. *See* Appendix C; *see also* Declarations of Katherine A. Brady, James F. Smith, and Norton Tooby filed in *In re Resendiz*, No. S078879 (Cal.) (see lodged documents L-5, L-11, L-12). In New York, the state with the second largest lawful resident immigrant population, criminal defense lawyers of *amicus* The Legal Aid Society of the City of New York, the largest provider of criminal defense legal services in the state, have received initial orientation, update training, a staff manual chapter, and training update written materials, about the immigration consequences of criminal convictions. *See* Affidavit of Dennis R. Murphy, filed with *amicus curiae* brief of the NACDL & the National Legal Aid and Defender Association before the Attorney General in *Matter of Soriano*, Int. Dec. 3289 (AG 1998) (see lodged document L- 10). A sampling of the national and state training programs conducted for defense lawyers throughout the country in the years preceding the 1996 amendments is included in Appendix C.

D. In-House or Outside Experts Also Advised Defense Lawyers Regarding the Immigration Implications of Conviction and Relief from Deportation

Defense lawyers also consulted with experts for guidance on the immigration consequences of criminal convictions and the evaluation of specific plea bargain choices in individual criminal cases. On a national level, the National Immigration Project has responded to about 800 inquiries from criminal defense lawyers every year. In addition, immigration law experts in many of the high-immigrant population states have provided assistance on determining the specific interplay between federal immigration law and these states' criminal laws. In California, for example, the Immigrant Legal Resource Center, a nonprofit legal backup center, has conducted telephone consultations for public defenders and private attorneys to answer questions concerning the immigration consequences of choices faced by noncitizen defendants in criminal proceedings. *See* Brady Decl., ¶ 8. Other public defense or legal aid offices have their own in-house experts available for consultation on immigration issues. For example, the immigration law training provided to its staff by the Criminal Defense Division of *amicus* The Legal Aid Society of the City of New York has been supplemented by the presence on staff of attorneys with special expertise in immigration law. *See* Murphy Aff., ¶ 6. In the years prior to the 1996 deportation amendments, these outside or in-house immigration experts provided guidance to defense attorneys not only on deportability, but also on whether a noncitizen defendant would be able to apply for relief from deportation and the likelihood of obtaining such relief.

E. Lawful Resident Immigrants Pled Guilty in Reasonable Reliance on the Advice of their Lawyers and Others that They Had a Right to Seek Relief from Deportation

The experience of *amici* is that lawful permanent resident immigrants accused of crimes are generally extremely concerned about the immigration implications of their criminal cases. Many lawful permanent residents immigrated to this country at a young age, now work or study here, and have all their family here. Many have not been in the country in which they were born since early childhood, and some do not even know the language of that country. As a result, lawful permanent residents are often more worried about whether the disposition of their criminal case will lead to deportation than they are concerned about the criminal sentence. *See* Declaration of Larry Kupers filed in *Jun Li Tam v. Reno*, No. C-98-2835 MHP (9th Cir.) (see lodged document L-9) ("I cannot state strongly enough the enormous importance that his or her immigration status has to a Legal Alien and that it has been my experience that a Legal Alien will place that status first above all other considerations, including even guilt or innocence, when faced with criminal charges conviction of which could result in deportation"); *see also* Declarations of Cristina C. Arguedas & Nancy L. Clarence filed in *id.* (see lodged documents L-4 & L-6); Affidavit of Daniel Kanstroom filed with *amicus curiae* brief of the National Legal Aid and Defender Association & the New York State Defenders Association in *Bonhometre v. Reno*, No. 98-12333-NG (D. Mass.) (see lodged document L-8); *see also Mojica v. Reno*, 970 F.Supp. 130, 177 (E.D.N.Y. 1997) ("Deportation to a country where a legal permanent resident of the United States has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea"), *motion to withdraw appeal granted sub nom. Yesil v. INS*, 175 F.3d 287 (2d Cir. 1999).

In recognition of the severity of the penalty of deportation as a consequence of a criminal case, various ethical and professional standards require defense lawyers to advise noncitizen defendant clients about the immigration implications of pleading guilty. For example, the Standards for Criminal Justice of the American Bar Association have long provided that, where it is apparent that a defendant may face deportation as a result of a conviction, counsel "should fully advise the defendant of these consequences." *ABA Standards for Criminal Justice, Pleas of Guilty* (2d ed.), Standard 14-3.2, commentary at 75 (1982); *see also ABA Standards for Criminal Justice, Pleas of Guilty* (3d ed.), Standard 14-3.2(f), commentary at 27 (1999) ("it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction") (see lodged documents L-1, L-2). In addition, the Performance Guidelines of *amicus* National Legal Aid and Defender Association likewise recognize that it is defense counsel's duty to "be fully aware of, and make sure that the client is fully aware of . . . consequences of conviction such as deportation," and to explain to the client the potential consequences of any plea agreement. *NLADA Performance Guidelines for Criminal Defense Representation*, Guidelines 6.2(a)(3) and 6.3(a), at 77 (1994) (see lodged document L-3).[3]

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[3] While some courts have held that a defense lawyer's failure to advise regarding the immigration consequences of a guilty plea is insufficient basis for later *vacatur* of the plea because immigration consequences are not "direct" consequences of the conviction, the courts nevertheless generally recognize the independent responsibility of defense lawyers to advise regarding these "indirect" or "collateral" consequences. *See, e.g., United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985) ("It is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty; what is desirable is not the issue before us"); *see generally Michel v. United States*, 507 F.2d 461, 465-466 (2d Cir. 1974) (recognized defense counsel's obligation to advise about the "indirect consequences

To further ensure the required discussion between defense lawyer and noncitizen client regarding the immigration risks of pleading guilty, most of the high-immigrant population states – as well as Connecticut, the state where the respondent here pled guilty – require that trial judges advise defendants of potential immigration law consequences prior to accepting a guilty plea.[4]

Consistent with these standards and requirements, a leading treatise for defense lawyers advised:

> Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence. Thus, the immigration consequences of a prosecution may totally alter the strategies chosen . . . . [An] attorney who suspects that his client is an alien has a duty to inquire and to protect his client's immigration status. Pleas and admissions must be approached with caution and with knowledge of the consequences . . . .

3 Bender's *Criminal Defense Techniques*, § 60A.01 and § 60A.02[2] (1999).

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the guilty plea may trigger," including deportation); *Williams v. State*, 641 N.E.2d 44, 49 (Ind. 1994) ("attorney's duties to a client are [not] limited by a bright line between the direct consequences of a guilty plea and those consequences considered collateral"); *People v. Soriano*, 240 Cal. Rptr. 328, 335-336 (Ct. App. 1987) (citing ABA standards as evidence of defense counsel's obligation to advise clients fully about collateral consequences of their guilty pleas); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987) ("attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients").

[4] *See, e.g.*, Cal. Penal Code § 1016.5 (1982); Conn. Gen. Stat. § 54-1j (West 1994 & Supp. 1999); Fla. R. Crim. P. 3.172(c)(viii) (1989); N.Y. Crim. Proc. Law § 220.50(7) (McKinney Supp. 1999); Tex. Crim. P. Code Ann. § 26.13(a)(4) (West 1989).

In order to fulfill their ethical and professional responsibilities, defense lawyers questioned their clients to determine whether the client was a noncitizen subject to the deportation laws. Many of the large providers of legal services for indigent defendants specifically directed their attorneys *always* to determine whether a client was a citizen. For example, criminal defense attorneys of *amicus* The Legal Aid Society of the City of New York were instructed: "It is fundamental to effective representation that we find out whether a client is a citizen or not before entering a plea of guilty . . . *In no event should a guilty plea be taken before the staff attorney establishes whether the client is a United States citizen or not.*" Memorandum to All Staff Attorneys of The Legal Aid Society, entitled "Ascertaining Client Citizenship Status," attached to Declaration of Susan L. Hendricks, filed with *amici curiae* brief of The Legal Aid Society of the City of New York, et al., in *Calcano-Martinez v. INS*, No. 98-4033, 98-4214, 98-4246 (2d Cir.) (emphasis added) (see lodged document L-7).

Once it was determined that a client was a noncitizen, a defense lawyer was then required to advise the client regarding the immigration implications of any plea option. *See, e.g.*, Memorandum to All Legal Aid Society Staff Attorneys entitled "Important Immigration Concerns in Your Criminal Practice," attached to Hendricks Aff.; Memorandum to All Attorneys of the Public Defender Division of the State of Connecticut, dated Mar. 12, 1991 (including Immigration Law Bulleting advising defense lawyers: "It is of critical importance that the defense bar (1) identify their alien clientele (2) identify the issues and collateral consequences relating to their alien clientele and (3) deal with the issues at the pre-conviction stage, rather than at the post-conviction, immigration hearing level") (see lodged document L-17).

Before the 1996 amendments, defense lawyers carried out their duty to advise their noncitizen clients regarding immigration consequences of conviction based on the immigration practice aids, training programs, and expert resources described above. These resources informed them

that they could advise a lawful permanent resident immigrant client convicted of a deportable offense that the client would later be able to apply for a waiver of deportation. Obviously, defense lawyers could not assure a lawful resident client that a waiver would be granted. But defense lawyers could – and did – inform lawful resident clients of their right to apply, and these clients relied on this advice. *See, e.g.*, Murphy Aff., ¶ 7 ("Over the years, many of our lawful permanent resident clients have relied on information that we have provided regarding their statutory right to apply for relief from deportation when pleading guilty to a criminal charge that made them deportable from the United States, or when choosing not to pursue an appeal"); Kupers Decl., ¶ 11 ("We knew that 212(c) relief was available to legal resident defendants who had a drug-related conviction of no more than five years and we so advised our clients"); Kanstroom Aff., ¶ 5 ("I am personally aware of many such plea agreements that were expressly predicated on the defendant's belief that he or she might be able to apply for so-called Section 212(c) relief").

Moreover, the counsel that lawful permanent residents received from criminal defense lawyers regarding the availability of relief from deportation was frequently supported or informed by the advice of other lawyers, community advocates, and the experiences of permanent resident immigrant family members, friends, and neighbors who had been in deportation proceedings but were not deported. Thus, even if they did not discuss immigration issues with their criminal lawyer, many lawful permanent residents were generally aware that their guilty plea would not automatically result in deportation. As one district court put it, "[a] lawful permanent resident is, in any event part of a community and it is not unreasonable to attribute to him or her a basic sense of what happens to other members of the resident alien community who engage in criminal conduct." *Pottinger v. Reno*, 51 F. Supp.2d 349, 363 (E.D.N.Y. 1998), *aff'd*, 2000 U.S. App. LEXIS 33521 (2d Cir.).

The awareness of defense lawyers and their lawful resident clients regarding the right to apply for relief from deportation is also demonstrated by the fact that defense lawyers negotiated, when necessary, for a case outcome that would preserve eligibility for 212(c) relief. It was common practice, for example, for federal criminal defense lawyers to negotiate sentences that would lead to less than five years of imprisonment for lawful resident immigrant clients charged with drug and other offenses in order to preserve eligibility. As one senior federal defender litigator in California stated:

> Our annual training and our periodic office meetings and informal training sessions had ingrained in us the need, if at all possible, to plead an [sic] Legal Alien client in a drug case to a sentence of no more than five years in order to be eligible for relief from deportation in the form of the so-called "212(c) relief." . . . In fact, in any case in which a Legal Alien defendant charged with drug trafficking faced a sentence in excess of five years if convicted, I and every other attorney in The Federal Defender's Office, with the agreement of the client, tried to avoid trial (no matter what the ultimate strength of the government's case) and negotiate a plea bargain to achieve a sentence of no more than five years.

Kupers Decl., ¶¶ 11-12; *see also* Kanstroom Aff., ¶ 4 ("Prior to 1996, when IIRIRA was passed, it was, without exception, a central component of my advice to clients and attorneys that if a plea agreement could not be structured in such a way as to avoid rendering a person subject to deportation, the next best option would be to attempt to structure a plea agreement to preserve the possibility of discretionary relief from deportation"); *see also Tasios*, 204 F.3d at 546 (court found that the petitioner had entered a plea agreement with the government and pled guilty on the understanding that he would receive a sentence that would leave him eligible to seek relief from deportation); *Jideonwo v. INS*, 224 F.3d 692, 699 (7th Cir. 2000) (same);

Tam v. Reno, 1999 U.S. Dist. LEXIS 3577, *3-5, 26 (N.D. Cal. 1999), *rev'd and remanded*, 2001 U.S. App. LEXIS 541 (9th Cir. 2001) (District Court found that availability of 212(c) relief played a role in petitioner's decision to plead guilty, and Court of Appeals remanded for evidentiary hearing to allow petitioner to pursue this claim).

In most criminal cases before the new laws, such negotiating with the express purpose of preserving eligibility for relief was not necessary because, under prior law, even conviction of the charged offense would not have triggered mandatory deportation (e.g., offense was not subject to prison sentence of five years or more). However, had lawful resident immigrant defendants who pled guilty prior to the 1996 amendments been aware of the new bars to relief from deportation, there are a number of steps they might have taken to avoid mandatory deportation. Some of these steps would be counterintuitive in the case of a U.S. citizen defendant, and a defense lawyer would not have advised such a course of action in the past. For example, based on the advice of his or her lawyer, a lawful resident client charged with a misdemeanor or low-level felony drug *sale* offense in the past might have decided to plead guilty in order to avoid prison time, even if the client professed innocence of any intent to sell the drugs found in his or her possession. The lawyer would have been correct to advise the client that the guilty plea with a sentence of little or no jail time would not trigger ineligibility for relief under the law at the time, even though the conviction could be deemed an aggravated felony. *See, e.g., United States v. Graham*, 927 F. Supp. 619 (W.D.N.Y. 1996) (New York misdemeanor criminal sale of marijuana is an aggravated felony). However, had the lawyer known that future laws were going to impose ineligibility for relief and mandatory deportation for any aggravated felony conviction regardless of sentence, the lawyer could have instead sought to negotiate a plea to an equivalent or higher level felony drug *possession* offense and a longer sentence in order to avoid conviction of an aggravated felony. *See, e.g., Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996)

(New York Class A felony possession of a controlled substance without sale element is *not* an aggravated felony for immigration purposes). Or, if the lawyer was unable to negotiate a non-aggravated felony plea, the client might have chosen to stand trial on the sale charge in the hope of acquittal. *See, e.g., Arias-Agramonte v. Commissioner of INS*, 2000 U.S. Dist. LEXIS 10724, *4-6, 43 (S.D.N.Y. 2000) (after citing findings of immigration judge regarding lawful resident immigrant who pled guilty to a deportable offense prior to the 1996 amendments despite evidence of his innocence and no prior criminal record, the court stated "[c]ertainly Arias, who at the time of his arrest was expecting his first child, and who pled guilty at least in part because he would only receive probation, may well have stood trial, with its concomitant risk of prison time upon a jury verdict of guilty, had the consequences been known to him").

The careful planning and counseling that would have gone into the choices faced by lawful permanent resident immigrants and their lawyers in criminal proceedings in the past if they had known of the mandatory deportation provisions of the new laws is reflected by the heightened responsibility now assigned to both trial judges and defense lawyers to warn defendants of the threat of deportation, *see ABA Standards for Criminal Justice, Pleas of Guilty* (3d ed.), Standards 14-1.4(c) & 14-3.2(f) (1999) (see lodged document L-2), and by the numerous new immigration resources developed in order to enable defense lawyers to counsel their noncitizen clients properly regarding the impact of these provisions today.[5] These new standards

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[5] Examples of specialized manuals that have been prepared for defense lawyers since 1996 are: Norton Tooby with Katherine A. Brady, *Criminal Defense of Immigrants* (Law Offices of Norton Tooby, National Ed., 1999); Maria Baldini-Potermin, *Defending Non-citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios* (Minnesota Bar Association, 1998 – 2000); Manuel D. Vargas, *Representing Noncitizen Criminal Defendants in New York State* (New York State

and resources underscore how different would have been the advice defense lawyers gave to a noncitizen client considering a guilty plea in the past if they knew that what then seemed to be a favorable plea deal would now trigger mandatory deportation. For example, in its commentary to its new plea standards, the ABA observed:

> The Immigration and Nationality Act ("INA"), in the wake of the 1996 amendments . . . constitutes a great threat to non-citizen defendants who are considering a plea of guilty . . . The expansion of the "aggravated felony" list is significant because conviction of an aggravated felony generally means certain and speedy deportation given that the defendant will not, under the statute, be eligible for most discretionary relief from removal. Under the amended INA, then, a plea deal that might otherwise seem attractive – for example, a suspended 1-year sentence for misdemeanor theft – may often look considerably different once it is determined that that plea would in fact be deemed an "aggravated" felony conviction leading to the alien client's swift deportation.

Id., Standard 14-1.4(c), commentary at 58, n.96 (1999).[6]

Indeed, if deportation had been a certainty, rather than the calculated risk it was before the 1996 amendments, lawful resident immigrant defendants would have

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Defenders Association, 1st and 2nd eds., 1998, 2000). In addition, several new state-based initiatives have been established to provide training and consultation resources for defense lawyers.

[6] Several recent court decisions confirm the ABA's conclusion that even a guilty plea to a misdemeanor theft offense – which might have been a good plea deal from a defense perspective in the past – could now be deemed an "aggravated felony." *See, e.g., Erewele v. Reno*, 2000 U.S. Dist. LEXIS 11765 (N.D. Ill. 2000) (held that "aggravated felony" term includes conviction of a misdemeanor shoplifting offense with suspended sentence of twelve months in prison).

been much less likely to plead guilty in many circumstances. Before agreeing to plead guilty, many specifically asked their defense lawyers what chance they would have of being granted relief from deportation, and then weighed the *likelihood* of deportation just as they weighed other aspects of a plea offer, such as the probable sentence, the availability of parole, and the overall disruption that the plea would cause to themselves and their families. Sadly, those lawful permanent residents who tended to rely the most on the possibility of a waiver of deportation were those with the strongest equities, e.g., individuals who had lived virtually their entire lives in the United States, whose family members were all in the United States, or who had served in the U.S. military. Even if such a permanent resident had no prior criminal record and the evidence of guilt was weak, he or she might nevertheless have pled guilty based on information or advice that deportation would not be automatic and that they would have a good chance of having their 212(c) application granted if they could demonstrate those very same factors – family, job, residence, etc. – that made it more likely that the lawyer would be able to negotiate a plea with little or no jail time.[7]

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[7] Many courts have concluded that the possibility of a waiver of deportation could be a critical factor in the plea-bargaining process. *See, e.g., Tasios*, 204 F.3d at 551 ("[P]rior to the passage of AEDPA the legal effect of pleading guilty . . . was mitigated by the realistic possibility of obtaining a waiver under § 212(c)"); *Mattis v. Reno*, 212 F.3d 31, 39-40 (1st Cir. 2000) ("[T]here is reason to believe that there might be some aliens who [entered guilty pleas before April 1996] in actual and reasonable reliance on the availability of § 212(c) relief"); *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien charged with a crime involving controlled substances would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented").

In sum, the experience of *amici* is that, prior to the 1996 amendments, our lawful resident immigrant clients understood that deportation was generally not automatic upon conviction of a deportable offense. Our lawful resident clients often pled guilty in reliance on this understanding when they could have gone to trial or made other choices in their criminal case in order to seek to avoid mandatory deportation had they had notice of what future legislation would bring.

II. THE COURT BELOW CORRECTLY FOUND THAT THE GOVERNMENT'S APPLICATION OF THE 1996 AMENDMENTS TO PRE-AMENDMENT GUILTY PLEAS IS IMPERMISSIBLY RETROACTIVE

The criminal justice system relies heavily on the willingness of individuals to plead guilty and forego their right to a jury trial. In fact, more than 90 percent of criminal convictions today are obtained by guilty plea. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Section 5: Judicial Processing of Defendants*, Tables 5.30, 5.51 in *Sourcebook of Criminal Justice Statistics 1999*, (2000) (over 95 percent of federal convictions and over 91 percent of felony convictions in state court are obtained by guilty plea). Without this willingness of the criminally accused to plead guilty, the wheels of justice would most certainly grind to a screeching halt. As the Court has stated:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Santobello v. New York, 404 U.S. 257, 260 (1971).

Given the importance of the rights relinquished when an individual agrees to plead guilty,[8] the integrity and fairness of the plea bargaining process requires strict application of rules to protect the expectations underlying the plea.[9] These include not only the Ex Post Facto Clause

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[8] Those accused of crimes who agree to plead guilty – sometimes even when innocent of the criminal charges – give up fundamental rights at the core of our nation's Bill of Rights. They give up not only their right to a trial by a jury of their peers, *Duncan v. Lousiana*, 391 U.S. 145 (1968), but also their rights to confront one's accusers, *Pointer v. Texas*, 380 U.S. 400 (1965), to present witnesses in one's defense *Washington v. Texas*, 388 U.S. 14 (1967), to remain silent, *Malloy v. Hogan*, 378 U.S. 1 (1964), and to be convicted by proof beyond all reasonable doubt, *In re Winship*, 397 U.S. 358 (1970). Recognizing the significance of an individual's agreement to plead guilty, the Court has recognized the importance of counsel during plea negotiations, *Brady v. United States*, 397 U.S. 742, 758 (1970), the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), and the requirement that a prosecutor's plea bargaining promise be kept, *Santobello*, 404 U.S. at 262.

[9] Retroactive application of mandatory deportation provisions compromises the integrity of the plea bargaining process by disrupting the legitimate expectations not only of the noncitizen defendant but also of other actors in the criminal justice system. For example, retroactive application of new laws to change the legal effect of a guilty plea undermines the efforts of defense attorneys who try to comply with ethical standards and to provide effective counsel to noncitizen defendants regarding the consequences – both direct and indirect – of a plea. Ironically, those defense attorneys who made the best efforts to provide effective counsel on the immigration implications of guilty pleas are the attorneys whose clients may have most relied on the availability of relief from deportation. In addition, retroactive application undermines the expectations of prosecutors who may have agreed to a lesser or alternative plea, or a lenient sentence, prior to the 1996 amendments with the expectation that it would allow the defendant to return sooner to his or her home and family in the United States. *See Harmelin*

prohibition on retroactive application of later "punitive" legislation, but also the presumption against retroactivity of other subsequently enacted laws that change the consequences of the plea, even if the new laws are not deemed punitive in nature. As the Court has stated:

> The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen . . . . In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, *but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.*

Lynce v. Mathis, 519 U.S. 433, 439-440 (1997) (emphasis added).[10]

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v. Michigan, 501 U.S. 957, 1008 (1991) (prosecutorial discretion allows for consideration of individualized circumstances to ameliorate the effect of mandatory sentences). Likewise, retroactive application of mandatory deportation laws also undermines the expectations of a trial judge who accepted a plea or imposed a sentence also with the expectation that the defendant would be permitted to return to home and family.

[10] Although the Court here need not reach the background constitutional issues implicated by retroactive applications of new rules to past conduct, *amici* note that this case does raise Due Process Clause concerns. *See Landgraf*, 511 U.S. 244, 266 ("The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation"). In addition, were the Court not to apply the traditional presumption against retroactivity, this case would provide an appropriate vehicle for the Court to reconsider the current viability of its prior decisions holding that deportation laws are not subject to the Ex Post Facto Clause. *See* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least*

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court reaffirmed the traditional presumption against retroactivity. The Court stated that the inquiry as to whether application of a new statute would have impermissible retroactive effect requires a "common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' " *Id.* at 269. The determination is guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* One way that application of a new statute to past events will be found to have retroactive effect is if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. . . . " *Id.* (quoting Justice Story in *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, No. 13,156 (C.C.D.N.H. 1814)).

The government's application of the 1996 deportation relief bars to lawful permanent residents convicted of committing deportable offenses prior to the new law unquestionably eliminates a legal right – eligibility to apply for 212(c) relief from deportation – or attaches a new disability – ineligibility to apply – based on criminal conduct and convictions that occurred in the past. Under prior law, convicted long-time lawful permanent residents faced possible, but not certain, deportation. However, if the 1996 amendments are applied to them, their statutory right to seek 212(c) relief is taken away and deportation becomes virtually inevitable. The government's position changes a possibility of deportation into a certainty of deportation.

The Court's retroactivity jurisprudence establishes that such a change in legal risk has impermissible retroactive effect when applied to prior conduct or transactions even if the new law does not change the maximum extent of a party's liability. *See, e.g., Hughes Aircraft Company v.*

Some of the Constitution's Criminal Procedure Protections Must Apply, 52 Adm. L.R. 305 (Winter 2000).

United States ex rel. Schumer, 520 U.S. 939 (1997) (finding retroactive effect when a 1986 amendment was applied to cause a private party to lose a prior defense against private suits for submitting a false claim to the government, even though elimination of the defense in question did not increase the defendant's liability exposure because the defense had never been available in suits brought by government litigators).

Moreover, the Court's Ex Post Facto Clause case law, to which the Court turns to determine what civil as well as criminal law consequences have a genuine retroactive effect,[11] has long recognized the retroactive effect of a change from a discretionary penalty system to a system of mandatory penalties. *See Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663 (1974) (held that a statute eliminating parole eligibility for offenses subject to parole under the law at the time of commission was impermissible as an ex post facto law); *Lindsey v. Washington*, 301 U.S. 397 (1937) (held that a statute changing a maximum sentence to a mandatory sentence for offense committed prior to the statute's enactment is an impermissible ex post facto law). In *Lindsey*, the Court stated:

> Removal of the *possibility* of a sentence of less than fifteen years . . . operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old . . . . We need not inquire whether this is technically an increase in the punishment annexed to the crime . . . . It is plainly to the substantial disadvantage of petitioners to be deprived of *all* opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15 year term.

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[11] *See, e.g., Hughes Aircraft*, 520 U.S. at 948 (citing *Collins v. Youngblood*, 497 U.S. 37 (1990) and *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)); *Landgraf*, 511 U.S. at 269 n. 23 (citing *Miller v. Florida*, 482 U.S. 423 (1987)).

Id. at 401-02 (citations omitted) (emphasis added).[12] Similarly, taking away the statutory right to apply for discretionary 212(c) deportation relief, thus making deportation mandatory, must be considered retrospective. *See Tasios*, 204 F.3d at 552 ("As cases decided under the Ex Post Facto Clause establish, any change of outcomes from a discretionary relief to one of prescribed outcomes is retroactive").

The change in the legal consequence of pre-amendment guilty pleas here is graphically illustrated by the disruption of the reasonable reliance of lawful resident immigrants on prior law, as described in Point I above. Reasonable reliance on prior law is a hallmark indicator of whether a new law has retroactive effect. *See Landgraf*, 511 U.S. at 282-83 (a "legal change that would have an impact on private parties' planning" operates retrospectively). Thus, not surprisingly, a growing number of courts have found that the government's application of new deportation laws barring 212(c) relief is impermissibly retroactive based on the reasonable reliance of lawful permanent resident immigrants on their eligibility under the law at the time they were convicted.[13]

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[12] *See also Lynce*, 519 U.S. 433 (held that cancellation of provisional early release credits awarded to alleviate prison overcrowding was a retroactive effect in violation of the Ex Post Facto Clause); *Weaver v. Graham*, 450 U.S. 24 (1981) (held that a new law repealing an earlier statute and reducing amount of "gain time" for good conduct and obedience to prison rules deducted from a convicted prisoner's sentence violated Ex Post Facto Clause).

[13] For example, the Fourth Circuit last year retreated from its prior decision in *De Osorio v. INS*, 10 F.3d 1034 (4th Cir. 1993), in which the court had suggested that the possibility of a waiver of deportation was not relevant to noncitizen decision-making in the criminal process, stating: "[W]e conclude that the observations made in *De Osorio* do not account for the essential retroactive consequences of removing the availability of 212(c) relief." *Tasios*, 204 F.3d at 551. The Fourth Circuit found that

In sum, many lawful permanent residents pled guilty in specific reliance on the real promise of avoiding deportation offered by the statutory right to apply for 212(c) relief, or in general reliance on knowledge that there would be some consideration of the equities in their cases before any government decision to carry out a deportation. As discussed in Point III below, such reliance is not necessary to show the retroactive effect of the government's application of AEDPA Section 440(d) and IIRIRA Section 304(b). Nevertheless, the reasonable reliance on prior law confirms and illustrates the retroactive effect of the application of these new laws to pre-enactment pleas. Thus, the Court should affirm the lower court's application of the presumption against retroactivity at least with respect to lawful resident immigrants who agreed to plead guilty prior to the new laws.[14]

AEDPA 440(d) would upset reasonable, settled expectations and change the legal effect of prior conduct if applied to guilty pleas before AEDPA's effective date, and thus should not be applied to *any* case based on a pre-AEDPA guilty plea. As the Fourth Circuit explained: "By withdrawing the availability of [§ 212(c)] relief, AEDPA § 440(d) worked a *fundamental change* in the legal effect of such a plea . . . ." *Id.* at 552 (emphasis added).

[14] Although the court below limited the extent of its holding to individuals who pled guilty prior to the 1996 amendments, lawful permanent resident immigrants also relied on the availability of relief from deportation in making other choices during criminal proceedings, such as a decision to reject an offered plea deal and go to trial where relief eligibility existed under prior law even if the individual was found guilty after trial of the more serious charged offense, or a decision to fight certain charges more than others at trial, or a decision not to appeal a conviction after trial. Thus, although the choice whether to plead guilty is one of the most important decisions a defendant faces, it is by no means the only choice that may be affected by the availability of relief from deportation.

III. IN ANY EVENT, THE GOVERNMENT'S APPLICATION OF THE 1996 AMENDMENTS TO THE UNDERLYING ORIGINAL CONDUCT IS IMPERMISSIBLY RETROACTIVE

In order to determine whether application of a new law to past conduct has an impermissible retroactive effect, what matters is simply "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-270. Principles of fair warning require no less. As the Court stated in *Landgraf*:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; . . . . For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Id., at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

Thus, in *Landgraf* and other cases where the Court has analyzed whether a new civil statute has impermissible retroactive effect, the essential question is not whether the person later expressly relied on a given understanding of the law, but whether applying the new law to the original past conduct changes the consequences of that conduct. *See id.* at 283-284 (finding retroactive effect of new punitive and compensatory damages and jury trial provisions of the Civil Rights Act of 1991 even though there was no finding of reliance on prior law and the sexual harassment conduct at issue was already illegal at the time of the conduct); *Rivers v. Roadway Exp. Inc.*, 511 U.S. 298 (1994) (finding retroactive effect of new right of action for discriminatory contract terminations in the Civil Rights Act of 1991 even though the parties believed that the right of action existed when they acted and therefore they could not have relied on prior law); *Hughes Aircraft*, 520 U.S. at 948 (finding retroactive effect when a private party lost a

defense against private suits for submitting a false claim to the government, even though the private party never had such a defense against a government suit and there was no showing that the party relied on the government failing to pursue a suit).

The Court's retroactivity analysis in its ex post facto decisions also focus on whether applying the new law at issue to past conduct changes the legal consequence of the original criminal conduct, rather than on whether the affected individual later acted in reliance on prior law. In these decisions, the crucial benchmark for determining retroactive effect of new penalties for criminal conduct is the law that was in existence on the date of that original conduct, as opposed to the law on the date of plea or conviction. *See, e.g., Miller v. Florida*, 482 U.S. 423 (1987) (found retroactive effect when the government applied revised sentencing guidelines that went into effect between the date of the petitioner's offense and the date of his conviction); *see also Johnson v. United States*, 529 U.S. 694 (2000) (held that original criminal conduct, not a subsequent violation of supervised release, was the operative event for retroactivity analysis). This is true even if the new statute applies only upon "conviction." *See Lindsey v. Washington*, 301 U.S. at 398, *rev'g State v. Lindsey*, 61 P.2d 293, 294 (Wash. 1936) (court found retroactive effect when the government applied a new sentencing statute that was triggered "[w]hen a person is convicted" to an individual who committed offense on April 15, 1935, even though criminal proceedings did not commence until after the new law was enacted on June 12, 1935).

In short, the Court's decisions in both the civil and criminal contexts recognize that people have a right to know the possible legal consequences of their actions at the time of their original conduct, whether or not they will be able to demonstrate subsequent acts in reliance on that knowledge. Indeed, it would be contrary to our system of justice, not to mention largely unfeasible and tremendously burdensome, for persons to have to prove actual individual reliance on prior law before they can avoid the

'adverse consequences of a new law. Rather, in our system of justice, it is presumed that a person acts in light of the law at the time of his or her actions. As one U.S. district judge stated:

> Individuals are presumed to act against a backdrop of legal obligations. If they were not, there would be little problem with the retrospective application of many laws; there are likely to be few instances of an individual poring over a statute book before acting. "Whether or not the operative conduct might have been different, the immigrant has a presumptive right to the imposition of only those consequences which could have attached at the time he committed his act."

Pena-Rosario v. Reno, 83 F. Supp.2d 349, 366 (E.D.N.Y. 2000) (Gleeson, J.) (quoting *Maria v. McElroy*, 68 F. Supp.2d 206, 229 (E.D.N.Y., 1999)).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court below.

Respectfully submitted,

JOSHUA L. DRATEL
National Association of Criminal Defense Lawyers

MANUEL D. VARGAS*
SEJAL R. ZOTA
New York State Defenders Association

**Counsel of Record (Other Organizations Listed in Appendix A)*

APPENDIX A: ORGANIZATIONAL STATEMENTS OF INTEREST

The **National Association of Criminal Defense Lawyers** (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 10,000 attorneys. NACDL is affiliated with 80 state and local criminal defense organizations with which it works cooperatively on issues related to criminal defense. Thus, it speaks for more than 28,000 criminal defense lawyers nationwide.

The **Association of Federal Defenders** (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. 3006A, and the Sixth Amendment of the United States Constitution. The AFD is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices. One of the AFD's missions is to file *amicus curiae* briefs to ensure that the positions of indigent *habeas corpus* petitioners previously convicted of criminal offenses are adequately represented.

The **California Public Defenders Association** (CPDA) has a membership of over 3,000 public defenders and private defense counsel. The CPDA attorney members act as legal counsel for over 95 percent of the indigents accused of criminal conduct in California. The CPDA, established in 1969, is the state-designated continuing legal education provider for all local public defender offices in the state of California, and also represents the interests of CPDA's criminal defense attorney

members in legislative and significant issues at the appellate court levels. Due to the numerous and complex immigration laws and regulations, criminal prosecutions and convictions can and do have serious adverse consequences for a substantial percentage of the defendants represented by our member attorneys, and thus the CPDA and its members have great interest in the outcome of this case.

The **Committee for Public Counsel Services** (CPCS), the Massachusetts public defender agency, is statutorily mandated to provide counsel to indigent defendants in Massachusetts criminal proceedings. G.L. c. 211D, §5. The issue presented in this case is of immediate importance to CPCS because many of its clients' criminal cases are resolved by a guilty plea or by an admission to sufficient facts. In addition, because many of its clients are not citizens of the United States, their guilty pleas have significant immigration consequences. As a result, CPCS attorneys are trained, and then required to advise clients not only of the nature of the plea colloquy, the constitutional rights they are giving up in pleading guilty, and the effect of the plea, but also the potential consequences of deportation, exclusion from admission to the United States, or denial of naturalization. *See* M.G.L. c. 278 § 29D; *CPCS Performance Standards.*

The **Cook County Public Defender's Office** is an independent Cook County agency operating within the largest unified court system in the world. Services are provided by Administrative, Chicago, Suburban and Countywide Operations with multiple offices located in Chicago, Illinois, and five adjacent suburbs. The office employs 567 lawyers and provides legal representation to

nearly 400,000 people annually who cannot afford to hire a private lawyer, in adult criminal cases and appeals resulting from conviction. Because of the diversity of Cook County's population, a large percentage of the Office's clients are not United States citizens.

The **Division of Public Defender Services of the State of Connecticut** is a statewide public defender system responsible for providing legal representation to indigent persons in adult criminal cases, juvenile delinquency matters, habeas corpus proceedings, and appeals. The Division represents individuals in approximately 75,000 cases annually before the Connecticut courts. Attorneys in the Division handle approximately 75% of all cases in the 13 Judicial Districts and one-third of all cases in the 22 Geographical Areas of the Superior Court, as well as a significant percentage of cases before the Connecticut Supreme and Appellate courts. The Division of Public Defender Services is an independent agency of the State of Connecticut.

The **Florida Public Defender Association** consists of the State of Florida's twenty elected Public Defenders. Florida's Public Defenders have a constitutional and statutory duty to represent poor people accused of crimes in Florida's courts. The Florida Public Defender Association has an interest in matters affecting the administration of justice and the practice of criminal defense in the State of Florida. Florida is the state with the third highest percentage of immigrants among its population, with more than eighteen percent of Florida's fifteen million people born outside the country.

The **Los Angeles County Public Defender** is the primary trial counsel in the County of Los Angeles, California for all persons charged with crimes who are indigent and unable to afford private counsel. The Office is the largest office of trial counsel for criminal defendants in the State of California, with over six hundred trial lawyers. The Office represents tens of thousands of defendants each year in criminal proceedings who are long-term permanent resident immigrants. In addition, the Office is involved in post-conviction litigation in cases where long-term permanent resident immigrants are facing mandatory deportation as a result of the 1996 amendments to the deportation laws.

The **National Legal Aid and Defender Association** (NLADA) is a private, non-profit membership organization based in Washington, D.C. Founded in 1911, the NLADA is the only national organization devoted solely to assuring the delivery of high quality legal services to poor people. The NLADA often appears as an *amicus* party on issues of broad concern that address the constitutional right to counsel and equal access to and fairness in the judicial system. Its national membership includes members of the indigent defense and civil legal service bars, and professionals who provide related services. Many of the nation's public defender organizations, as well as assigned counsel and private criminal defense practitioners, are NLADA members. NLADA member lawyers have also represented thousands of long-term lawful permanent resident immigrants in criminal proceedings.

The **New York State Association of Criminal Defense Lawyers** (NYSACDL) is a non-profit membership organization of more than 1,100 attorneys who practice criminal defense law in the State of New York. Its purpose is to assist, educate, and provide support to the criminal defense bar to enable them to better serve the interest of their clients and to enhance their professional standing.

The **New York State Defenders Association** (NYSDA) is a non-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. Its objectives are to improve the quality of public defense services in the state, establish standards for practice in the representation of poor people, and engage in a statewide program of community legal education. Among other initiatives, NYSDA operates the Criminal Defense Immigration Project, which provides public defender, legal aid, and assigned counsel program lawyers with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law.

The **Public Defender of Florida's Eleventh Judicial Circuit, Honorable Bennett H. Brummer,** is the elected state constitutional officer charged with representing poor people accused of crimes in Miami-Dade County. Miami-Dade is Florida's most populous county, and the Office of the Public Defender employs 200 lawyers to handle approximately 90,000 cases a year. In many of those cases, attorneys are called upon to advise clients of the potential immigration consequences of plea bargains. Half of Miami-Dade County's more than two million

residents were born outside the United States, and Miami-Dade has the highest immigration rate of any urban county nationwide.

The **Texas Criminal Defense Lawyers Association** is an organization of more than 2,300 attorneys in Texas who represent people accused of crimes. The application of immigration laws to criminal convictions affects a large number of the clients of Association members who are not citizens of the United States. Since Texas is a border state, Association members regularly represent immigrants. The retroactive application of the immigration laws has exposed many Association members to complaints and disciplinary hearings regarding ineffective assistance of counsel. For these reasons, the outcome of this case is of critical interest to Association members.

The Legal Aid Society of the City of New York is a private, non-profit legal services agency that represents poor New York City residents who cannot afford to hire a lawyer. The Criminal Defense Division, the largest division of The Society, employs more than 400 attorneys. Since 1965, the Division has been the primary public defender for indigent persons who are prosecuted for crimes in state courts in New York City. In fiscal year 1999, the Division represented more than 180,000 clients in New York, Kings, Queens, and Bronx counties. Because of the diversity of the New York City population, a large percentage of the Division's clients are not United States citizens.

The **Washington Defender Association** (WDA) is a non-profit membership organization comprised of public defenders, assigned counsel and legal aid attorneys

throughout the State of Washington. WDA's mission is to promote, assist and encourage public defense systems which ensure that all accused persons in every court receive effective assistance of counsel. In recognition of the severe immigration consequences that may result to noncitizen defendants, the WDA operates the Washington Defenders Immigration Project (WDIP). WDIP provides case-by-case technical assistance and training to public defenders and assigned counsel representing noncitizen clients throughout Washington State.

APPENDIX B: PARTIAL LIST OF PRE-APRIL 1996 PUBLICATIONS AND PRACTICE MATERIALS ON THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

NATIONAL MANUALS/TREATISES/PRACTICE MATERIALS:

1. Larry Ainbinder, updated by Hilary Hochman, Ch. 17, *Special Considerations in Representing the Non-Citizen Defendant,* in *Defending A Federal Criminal Case* (Federal Defenders of San Diego, an updated Chapter 17 has been included in the nationally distributed manual from 1983 – 2000).

2. Kari Converse, *Keeping Dorothy in Kansas After Ozkok: New Strategies for Defending Non-Citizens,* The Champion, Mar. 1989, at 8 (The National Association of Criminal Defense Lawyers).

3. Jeffrey B. Fawell & Robert S. White, *Effects Of Recent Immigration Legislation On Criminal Aliens & Defense Practitioners,* The Champion, Sept./Oct. 1995, at 10 (The National Association of Criminal Defense Lawyers).

4. Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions,* 23 Am. Crim. L. Rev. 425 (1986).

5. C. Gordon, et al., *Immigration Law and Procedure* (Bender, 1988 –).

6. Steven D. Heller, *Criminal Convictions And Aliens: Preventing The 'Collateral Consequence' Of Deportation,* 94-10 Immigr. Briefings 1 (1994).

7. Nancy Hollander & Kari Converse, Immigration Implications for the Alien Defendant (pts. 1 & 2), The Champion, May 1986, at 29, June 1986, at 16

(The National Association of Criminal Defense Lawyers).

8. Tova Indritz, *Representing a Non-Citizen Client in a Criminal Case* (training materials prepared for the annual Federal Judicial Center orientation seminar for Assistant Federal Defenders in Nov. 1994)

9. Katznelson, Conley & Martin, *Non-U.S. Citizen Defendants in the Federal Court System*, 8 Fed. Sentencing Rptr. 259 (1996).

10. Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law And Crimes* (West Group, 1984-1999).

11. Kowalski, *Sentencing Options for the Deportable Non-Citizen*, 8 Fed. Sentencing Rptr. 259 (1996).

12. Ira J. Kurzban, *The Immigration Act of 1990*, The Champion, Apr. 1991, at 5 (The National Association of Criminal Defense Lawyers).

13. McWhirter & Sands, *A Primer for Defending a Criminal Immigration Case*, 8 Geo. Imm. L. J. 23 (1994).

14. Norton Tooby, *Criminal Defense of Noncitizens*, 22 Immigration Newsletter, Nos. 3 and 4 (National Immigration Project 1995).

15. Alan Vomacka, *Immigration Considerations for the Criminal Defense Lawyer*, (pts. 1 & 2) The Champion, Apr. 1982, at 9, May 1982, at 4 (The National Association of Criminal Defense Lawyers).

STATE MANUALS/TREATISES/PUBLICATIONS/ PRACTICE MATERIALS:

1. Jan Bejar, *Exclusion or Deportation based on Narcotics and Alien Smuggling Offenses*, Mar. 1990 (article written for federal and state defenders practicing in San Diego area).

2. Jan Bejar, *Representing Aliens in Criminal Proceedings: Some Pitfalls for the Criminal Practitioner to Avoid*, California Attorneys For Criminal Justice Forum, Apr. 1994.

3. Jim Benzoni, *Defending Aliens in Criminal Cases* (training materials prepared for criminal defense lawyers attending Continuing Legal Education programs in Iowa from 1994-1997).

4. Katherine A. Brady, et al., *California Criminal Law And Immigration* (Immigrant Legal Resource Center, 1990-1999).

5. Katherine A. Brady & Hon. Dana Marks Keener, Ch. 48, *Representing a Noncitizen Criminal Defendant in California Criminal Law Procedure And Practice* 1285 (Continuing Education of the Bar of California, 3rd ed., 1994 – 1996).

6. Katherine A. Brady & David S. Schwartz, *Public Defenders Handbook On Immigration* (California Public Defenders Association, 1988).

7. Katherine A. Brady, *New Developments in Representation of Non-Citizen Defendants*, 19 California Attorneys For Criminal Justice Forum, No. 2, at 30 (1992).

8. Jeffrey N. Brauwerman & Stephen E. Mander, *IMMACT 90 Revisions Regarding Immigration Consequences Of Criminal Activity*, 66-May Florida Bar Journal 28 (1992).

9. Sarah M. Burr, *Immigration Consequences of Criminal Convictions for Non-Citizen Clients*, 1990, 1991 (training materials prepared for Criminal Defense Division of The Legal Aid Society of the City of New York).

10. Robert Frank, *Criminal Defense Of Foreign Nationals*, 167-Mar. N.J Law. 36 (1995).

11. Josie Gonzalez, *Immigration Consequences of Criminal Convictions for "Amnesty" Applicants and Other Immigrants*, Jan. 1988 (training materials prepared for the Los Angeles Public Defender's Office).

12. J. Gonzalez, *Representing Accused Non-Citizens*, California Attorneys for Criminal Justice, Statewide Criminal Law Seminar Syllabus (May 6, 1978).

13. *Immigration Issues for Criminal Defense Lawyers*, Ch. 17, in *Deborah T. Creek Criminal Practice Institute Trial Manual* (Public Defender Service for the District of Columbia, 1995).

14. D. Kanstroom, *Immigration Consequences of Criminal Convictions* (training materials prepared for the 1996 Annual Statewide Training Conference of the Committee for Public Counsel Services (Massachusetts Public Defender)).

15. Daniel Kanstroom, *Immigration Consequences of Criminal Offenses* in *Massachusetts Criminal Defense* 106 – 115 (Eric Blumenson & Stanley Z. Fisher ed., Butterworth Legal Publishers, 1992; 1993 update).

16. Daniel M. Kowalski & Daniel C. Horne, *Defending the Noncitizen*, 24 Colo. Law. 2177 (Specialty Law Column, 1995).

17. John J. LaCava, *Immigration Consequences of Criminal Convictions: A Primer for the Criminal Lawyer*, Nov. 1990 (training materials disseminated to all the Connecticut Public Defender offices by the Criminal Justice Section of Connecticut Bar Association).

18. Margaret McManus, *Immigration Consequences of Criminal Conduct*, Sept. 1985 (training materials prepared for Criminal Defense Division of The Legal Aid Society of the City of New York).

19. Robert Pauw & Jay Stansell, *Immigration Consequences of Criminal Convictions*, 1992, 1995 update

(training materials prepared by Northwest Immigrants Rights Project for criminal defense attorneys in Washington).

20. Mary L. Sfasciotti, *Representing Aliens in Criminal Cases – Recent Amendments to the Immigration and Naturalization Act*, 79 Ill. B.J. 78 (1991).

21. Dennis M. Sullivan, *Immigration: The Consequences of A Criminal Conviction*, 63-Apr. Wis. Law. 16 (1990).

22. Tarik H. Sultan, *Immigration Consequences of Criminal Convictions: A Guideline for the Criminal Defense Attorney*, 30-Jun Ariz. Att'y 15 (1994).

23. The Legal Aid Society Criminal Appeals Bureau, *Representing Clients Who are not United States Citizens: Immigration Consequences of Convictions and Appellate Considerations*, (1992).

24. Alfred Zucaro, Jr. & Beth L. Mitchell, *Criminal Convictions: The Immigration Consequences*, 63-May Fla. B.J. 36 (1989).

APPENDIX C: EXAMPLES OF PRE-APRIL 1996 TRAININGS FOR CRIMINAL DEFENSE LAWYERS ON THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

NATIONAL

The National Immigration Project of the National Lawyers Guild sponsored the following Continuing Legal Education (CLE) seminars for criminal defense lawyers:

- Jan. 28, 1984, Boston, MA, "Immigration Consequences of Criminal Convictions"
- Feb. 4, 1984, San Francisco, CA, "Immigration Consequences of Criminal Convictions"
- Feb. 11, 1984, Los Angeles, CA, "Immigration Consequences of Criminal Convictions"
- Mar. 17, 1984, Sacramento, CA, "Immigration Consequences of Criminal Convictions"
- May 11, 1984, New York, NY, "Immigration Consequences of Criminal Convictions"
- June 25, 1984, Portland, OR, "Immigration Consequences of Criminal Convictions"
- June 25, 1984, Seattle, WA, "Immigration Consequences of Criminal Convictions"
- Nov. 18, 1985, Washington, D.C., "Immigration Consequences of Criminal Convictions"
- Dec. 6, 1985, Miami, FL, "Immigration Consequences of Criminal Convictions"
- Sept. 29, 1989, South Padre Island, TX, "Immigration Consequences of Criminal Convictions"
- Jan. 19, 1990, Albuquerque, NM, "Trial Practice Skills: Drug Conviction 212(c) Waivers"

- May 30, 1990, Austin, TX, "Immigration Consequences of Criminal Conduct: Drug Convictions, Weapons Offenses, Aggravated Felonies and Crimes Involving Moral Turpitude"

- Nov. 10, 1990, San Francisco, CA, "Trial Tactics, Practice and Substance: 212(c) Waivers of Excludability"

- July 31, 1991, Seattle, WA, "Specialized Issues in the Immigration Act of 1990" [includes waivers and criminal grounds of deportability]

- Jan. 31, 1992, Chapel Hill, NC, "Defending Against Deportation . . . " [includes discussion of grounds of deportation and forms of relief]

- Aug. 4, 1993, New York City, NY, "Justice for Respondents in Immigration Proceedings: Contesting Deportability and 212(c) Waivers for Criminal Offenders"

Federal Judicial Center (FJC) is the research and education agency of the federal judicial system. It has been training federal defenders across the country since 1971. The FJC conducts a national seminar for Assistant Federal Defenders every year, which often includes a segment on the immigration consequences of criminal convictions. For example, in Nov. 1994, the FJC conducted a training on "Considerations in Representing a Non-Citizen Client" at the "Orientation Seminar for Assistant Federal Defenders" in Phoenix, Arizona.

STATES

Jan Bejar, an immigration attorney in San Diego, California, has routinely provided annual updates of the immigration consequences of criminal convictions to the Federal Defenders of San Diego since 1990. He has also conducted immigration seminars for at least three of the annual Criminal Justice Act (CJA) Seminars in San Diego, a seminar required for admission to the San Diego CJA panel of court-appointed criminal defense attorneys. One such presentation was on June 4, 1991 on "The 1990 Changes in Immigration Consequences for a Criminal Defendant."

Anne Benson, while employed at the Northwest Immigrants Rights Project in Seattle, Washington, often trained Seattle public defenders about the immigration consequences of criminal convictions. For example, on Mar. 21, 1996, she provided training to The Defender Association (the largest public defender agency in Seattle-King County) on "Immigration Law & Crimes."

Jim Benzoni, an adjunct professor for immigration law at Drake University Law School in Iowa and one of the main attorneys doing immigration and criminal work in that state, has given numerous CLE's on the subject, particularly between 1994-1996. For instance, on Aug. 3, 1994, he conducted a CLE presentation on "Defending Aliens in Criminal Cases," which was sponsored by the Iowa Association of Criminal Defense Lawyers.

Katherine Brady is a national expert on the interplay of criminal and immigration law and has authored many publications on the subject. A partial list of CLE seminars, sponsored or co-sponsored by the **Immigrant Legal**

Resource Center, that she has given to train criminal defense attorneys in California to advise properly noncitizen clients of the immigration effect of criminal convictions follows:

- Sept. 1991, San Francisco, "Immigration Consequences of Crimes"
- Sept. 1991, Davis, "Immigration Consequences of Crimes"
- Oct. 1991, Los Angeles, "Immigration Consequences of Crimes"
- Nov. 1991, San Diego, "Immigration Consequences of Crimes"
- Mar. 1993, Davis, "Immigration Consequences of Criminal Convictions"
- Mar. 1993, San Diego, "Immigration Consequences of Criminal Convictions"
- Apr. 1993, San Francisco, "Immigration Consequences of Criminal convictions"
- Apr. 1993, Los Angeles, "Immigration Consequences of Criminal Convictions"
- Feb. 1995, San Francisco, "Immigration and Crimes"
- Apr. 1995, San Francisco, "Immigration Consequences of Crimes"
- May 1995, Los Angeles, "Immigration Consequences of Crime"
- May 1995, Fresno, "Immigration Consequences of Crimes"
- June 1995, San Diego, "Immigration Consequences of Crimes"

Victor Castro, an immigration attorney in Santa Clara, California, regularly provides training on the immigration consequences of criminal convictions for the Santa Clara County Public Defender's Office. In 1992, he also conducted a trainer for the Santa Clara criminal bar on the "Immigration Consequences of Criminal Convictions, Relief available to Noncitizens, and How to Strategize to Provide a Legal Defense."

Federal Defenders of San Diego sponsors the annual Criminal Justice Act Seminar in San Diego, which is required for admission to the San Diego CJA panel of court-appointed attorneys. The seminar often includes a segment on the immigration consequences of criminal convictions. The Federal Defenders of San Diego also sponsors other immigration seminars for the criminal defense bar in San Diego and the surrounding areas such as the "Crime Control Act of 1994," part of which focused on "Aliens and Immigration Enforcement" on Dec. 7, 1994.

Daniel Kanstroom, the Director of the Boston College Immigration and Asylum Project and an Associate Clinical Professor at Boston College Law School, has for years provided training for public defenders about the interplay of criminal law and immigration law. One such presentation was on "Immigration Consequences of Criminal Offenses," on Mar. 8, 1995, for the Dorchester Bar Association.

The Legal Aid Society of the City of New York, Criminal Defense Division, has periodic in-house immigration training for all its staff attorneys on the immigration consequences of criminal convictions. Specifically:

- In 1985, Margaret McManus conducted an office-wide training on the "Immigration Consequences of Criminal Conduct."

- From 1989-present, The Legal Aid Society has had a city-wide training for the new staff attorneys on the immigration consequences of criminal convictions.

- In 1991, 1993, and 1994, The Legal Aid Society had a several-day-long advanced training for lawyers on "The Preparation and Trial of a Narcotics Case," which included a specific lecture on the immigration consequences of drug convictions.

Los Angeles County Public Defender provides in-house training for its staff attorneys every few years on the immigration consequences of criminal convictions. For instance on Jan. 13, 1988, Josie Gonzalez conducted an office-wide training on the "Immigration Consequences of Criminal Convictions for "Amnesty" Applicants and other Immigrants," and on Mar. 30, 1994, Gilbert Lopez conducted an office-wide seminar on the "Immigration Consequences of Criminal Convictions, Criminal Pleas, Diversion and Post-Conviction Remedies."

San Francisco City and County Public Defender has provided an in-house training for all of its staff attorneys every year on the immigration consequences of criminal convictions since 1990.

Professor James Smith, the Directing Attorney of the Immigration Law Clinic of the School of Law of the University of California at Davis, and the Davis Immigration Law Clinic have sponsored an average of 5 training

sessions each academic year and many individual consultations since 1987 for criminal defense counsel on the immigration consequences of crime.

Jay Stansell, while employed at Northwest Immigrants Rights Project in Seattle, Washington, conducted approximately two trainings per year for local defender agencies on the "Immigration Consequences of Crime," highlighting the availability of 212(c) relief for many clients. He also spoke at the following specific CLE trainings:

- Apr. 11, 1992, University of Washington School of Law, "Immigration Consequences of Crime"
- Oct. 21, 1993, Seattle, "Immigration Consequences of Crime," sponsored by Seattle-King County Bar Association
- Jan. 18, 1994, Seattle, "Immigration Consequences of Criminal Convictions," sponsored by Northwest Immigrants Rights Project
- Oct. 21, 1994, Seattle, "Importance of Immigration Considerations when Representing Juvenile Non-citizen Offenders," sponsored by Washington Defenders Association
- Mar. 31, 1995, Seattle, "Firearm Offenses and 212(c) Relief," sponsored by Washington Association of Criminal Defense Lawyers

Norton Tooby is a California attorney who specializes in the representation of non-citizens in criminal courts and the author of many publications on strategies to ameliorate the immigration consequences of convictions. A partial list of CLE seminars he has given to criminal defense lawyers on the immigration effects of criminal convictions follows:

- Sept. 18, 1990, San Francisco, "Post-Conviction Relief and Its Impact on Immigration Cases," sponsored by the Immigrant Legal Resource Center (IRLC) and Golden Gate Law School

- Sept. 25, 1990, San Jose, "Post-Conviction Relief and Its Impact on Immigration Cases," sponsored by ILRC and Golden Gate Law School

- Oct. 5, 1991, San Francisco, "Immigration Consequences of Crimes," sponsored by the ILRC

- Oct. 26, 1991, Davis, CA, "Immigration Consequences of Criminal Offenses," sponsored by the ILRC; State Bar Association; National Lawyers Guild; American Immigration Lawyers Association; and the U.C. Davis Immigration Law Clinic

- Mar. 6, 1993, Davis, "The Immigration Consequences of Criminal Convictions," sponsored by the ILRC and the California Bar Association, Criminal Law Section

- Apr. 3, 1993, San Francisco, "The Immigration Consequences of Criminal Convictions," sponsored by the ILRC and the California Bar Association, Criminal Law Section

- June 12, 1993, Los Angeles, "The Immigration Consequences of Criminal Convictions," sponsored by the ILRC and the California Bar Association, Criminal Law Section

APPENDIX D: INDEX OF DOCUMENTS LODGED WITH THE SUPREME COURT

PROFESSIONAL STANDARDS CITED IN BRIEF

ABA Standards for Criminal Justice, Pleas of Guilty (2d ed.), Standard 14-3.2, commentary (1982)..... L-1

ABA Standards for Criminal Justice, Pleas of Guilty, (3d ed.), Standards 14-1.4 & 14-3.2, commentary (1999)..... L-2

NLADA Performance Guidelines for Criminal Defense Representation, Guideline 6.2, 6.3, commentary (1994)..... L-3

AFFIDAVITS/DECLARATIONS CITED IN BRIEF

Declaration of Cristina C. Arguedas, filed in *Jun Li Tam v. Reno,* No. C-98-2835 MHP (9th Cir.) on Feb. 22, 1999..... L-4

Declaration of Katherine A. Brady, filed in *In re Resendiz,* No. S078879 (Cal.) on Jan. 7, 1999..... L-5

Declaration of Nancy L. Clarence, filed in *Jun Li Tam v. Reno,* No. C-98-2835 MHP (9th Cir.) on Feb. 22, 1999..... L-6

Declaration of Susan L. Hendricks, filed with *amici curiae* brief of The Legal Aid Society of the City of New York, et al., in *Calcano-Martinez v. INS,* No. 98-4033, 98-4214, 98-4246 (2d Cir.) on Nov. 17, 1999..... L-7

Affidavit of Daniel Kanstroom, filed with *amici curiae* brief of the National Legal Aid and Defender Association & New York State Defenders Association in *Bonhometre v. Reno,* No. 98-12333-NG (D. Mass.) on Feb. 1, 2000..... L-8

Declaration of Larry Kupers, filed in *Jun Li Tam v. Reno*, No. C-98-2835 MHP (9th Cir.) on Feb. 22, 1999 ..... L-9

Affidavit of Dennis R. Murphy, filed with *amici curiae* brief of the National Association of Criminal Defense Lawyers & the National Legal Aid and Defender Association before the Attorney General in *Matter of Soriano*, Int. Dec. 3289 on Apr. 30, 1998 ..... L-10

Declaration of James F. Smith, filed in *In re Resendiz*, No. S078879 (Cal.) on Jan. 7, 1999 ..... L-11

Declaration of Norton Tooby, filed in *In re Resendiz*, No. S078879 (Cal.) on Jan. 7, 1999 ..... L-12

UNPUBLISHED PRACTICE AIDS/TRAINING MATERIALS CITED IN BRIEF

Larry Ainbinder, updated by Hilary Hochman, Ch. 17, *Special Considerations in Representing the Non-Citizen Defendant*, in *Defending A Federal Criminal Case* 837, 838, 853 (Federal Defenders of San Diego, 1995 ed.) L-13

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